Supreme Court of the United States

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS, APPELLANT

vs.

THE STATE OF NEW HAMPSHIRE, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

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Opinions Below

The opinion of the New Hampshire Supreme Court is reported at 97 N. H. 352, 88 A. 2d 860. [61-66]* A previous opinion, entitled *State* v. *Derrickson*, answered questions of law before trial upon an agreed statement of facts and is reported at 97 N. H. 91, 81 A. 2d 312. [1-7]

Jurisdiction

Jurisdiction has been invoked under authority of the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter

* Figures in brackets refer to pages of the printed transcript of the Record.

440, 45 Stat. 466. This Court has postponed further consideration of the question of jurisdiction and the motion to dismiss or affirm pending a hearing on the merits, and transferred the case to the summary docket. [78]

The Ordinance

The ordinance drawn in question is copied from the statute which was construed as valid in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508 (1940) and affirmed by a unanimous court in *Cox* v. *New Hampshire*, 312 U. S. 569, 85 L. ed. 1049, 61 S. Ct. 762 (1941). It reappears in this case as sections 22, 23, 24 and 25, Article 7, Chapter 24 of the Municipal Ordinances of the City of Portsmouth, New Hampshire. It reads as follows:

> "Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.
>
> "Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.
>
> "Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such license[e] shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.
>
> "Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars."

The Supreme Court of New Hampshire has not departed from the original construction of this language, namely, that:

> "The discretion thus vested in the authority [City Council] is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate no power it did not possess. *State* v. *Cox, supra,* 143" [3]; *State* v. *Derrickson,* 97 N. H. 91, 81 A. 2d 312 (1951).

Statement of the Case

The case originates with a complaint for conducting an open air public meeting in a small park in the City of Portsmouth without a license, in violation of section 22 of the above-quoted ordinance. From a conviction in the municipal court an appeal was taken to the Superior Court. In advance of trial and upon an agreed statement of facts the case was reserved and transferred to the Supreme Court of the State for rulings of law. An opinion (not drawn in question in these proceedings) which is reported at 97 N. H. 91, found nothing in the agreed statement of facts stipulated by counsel which would "raise an inference that Portsmouth is guilty of palpable invasion of the [appellant's] rights under any guise whatever." [6-7] Upon a trial, *de novo,* in which the right to a jury was waived, the testimony developed somewhat differently than the statement of facts which had previously been submitted by counsel to the

Supreme Court. [59] Although the appellant admitted the violation of the ordinance, his counsel moved for a finding of not guilty, dismissal and discharge. [57] The situation may be summarized by the language of the trial court:

> "Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that this issue is not properly before it in these proceedings.
>
> "The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance." [13]

The Court found the appellant guilty, imposed a fine of twenty dollars, and exceptions were taken to the verdict and rulings of law. Stay of execution of the sentence was granted as a matter of routine. [71, 74]

The Supreme Court, in overruling the exceptions, noted the defense conceded the ordinance was valid on its face and found no reason for overruling the law as stated in this jurisdiction that a wrongful refusal of a license is not equivalent to a license. By citing precedent, it demonstrated that this was the established mode of judicial procedure and that the defendant's proper remedy for any arbitrary and unreasonable conduct of the City Council was in *certiorari* or other civil proceedings. Implicit in the decision is a finding that such remedies not only were proper but were also available under the circumstances of the case. [63, 66]

Facts

In accordance with a widespread policy, Jehovah's Witnesses filed petitions in the early spring of 1950 to hold open

air meetings during the summer months. [35] The petition in Portsmouth was denied after notice and a hearing on May 4th at which the representative of Jehovah's Witnesses appeared and spoke in support of his petition to hold meetings on June 26th and July 2nd. [36-39] His arguments were somewhat confusing to the Council, which was obviously unable to grasp the significance of his learned discussion of the CIO and Schneider cases. [38] In a manner which the State agrees was entirely arbitrary and unreasonable, permission to hold the meetings was denied. Full and complete testimony was permitted by the trial court in this regard. Appellant, well understanding that a permit was required by a valid law, went ahead without the permit on the belief that he had a right to speak. The appellee agrees that the meetings were without violence and that the arrests were made peaceably. It is also conceded that the talks did not constitute an immediate incitement to riot or other disorder.

Summary of Argument

The only opinion drawn into question in these proceedings is the opinion of the Supreme Court of New Hampshire in *State* v. *Poulos*, 97 N. H. 352, 88 A. 2d 860, which held that once the violation of the ordinance had been proved, the issues were complete and that a collateral attack upon the denial of the permit by the City Council was not a bar to the prosecution. New Hampshire holds no brief for the decision of the Rhode Island court in *Fowler* v. *Rhode Island*, No. 340, since the ordinance in that case and the opinion of that court is entirely inapplicable to a discussion of this case.

The State of New Hampshire has ever been mindful of the constitutional guarantees to the freedoms of assembly, speech and religion. Nowhere is this more easily demon-

strated than in its decisions relating to Jehovah's Witnesses.

The present case itself is evidence that burdens of time and expense undertaken by the appellant to vindicate his rights are self-inflicted. The supervisory power of the Supreme Court of our State, not only over lower courts but also over administrative tribunals of state and city alike, as conferred by our Constitution and statutes, is not an empty power. It is frequently used to give speedy, adequate and equal protection to constitutional rights. These are fundamentals and are elementary knowledge to every practical minded attorney of the state. These remedies have been used successfully by communists, and horse racers—it is reasonable to assume in the light of the judicial hospitality which Jehovah's Witnesses have enjoyed in New Hampshire that equal courtesy would be extended to them. The allegations of appellant's brief that the alternative remedies would impose burdens of time and expense are without any evidence of proof whatever. On the contrary, the time and expense of this litigation would be avoided if counsel had really wanted to do so.

The orderly procedure suggested by our courts is well established in New Hampshire. It is not recently concocted for the sake of this case. There has been no "turgevisation," "ruse", or "avoidance" by our courts. It has simply suggested a proper remedy which was available, which would have permitted these meetings as scheduled and which would not leave our communities at the mercy of any individual or group which wished to defy their laws with impunity on the grounds of religious belief or advice of counsel.

However time-burdened the remedies suggested by our court may be in other jurisdictions, the facts in New Hampshire do not support, but vigorously contradict, any such contention in this state.

The non-federal grounds upon which the Supreme Court of New Hampshire based its opinion are adequate to support its judgment.

Argument

I

The decision of the New Hampshire Supreme Court merely restated an elementary principle of local procedure.

If, contrary to the appellee's contention, there is a federal question to be decided in this case, it is one which should not be lightly stirred. It is the issue of claiming immunity from obedience to a general civil regulation that, according to the highest court of the land, has a reasonable relation to a public purpose within the general competence of the state. To encase the solution of this problem within the rigid prohibitions of unconstitutionality presents awful possibilities. Wisdom dictates that such an issue should not be unnecessarily nor wantonly assailed.

Except the facts be commensurate with the issue, they should not be dignified by a decision of this Court. To borrow a phrase from the appellant's brief, it is expecting too much to ask for a sound determination where the issue has been "artificially-inseminated." (39)* Whatever the contention of counsel, the decision of the New Hampshire Supreme Court, from which this appeal is taken, was purely and simply the reiteration of a well established principle of local law. It is not to be termed "hedgehopping" nor "turgevisation" nor "evation." (37, 24) Viewed in its judicial setting, it is above reproach and its sincerity beyond question. As distinguished from the opinion of its sister court in Rhode Island (No. 340), the New Hampshire Court dealt with an ordinance patently different, which had been sustained by this Court. *Cox v. New Hampshire*, 312 U. S. 569, 85

* Figures in parentheses refer to pages of Appellant's Brief.

L. ed. 1049, 61 S. Ct. 762 (1941). It refused to rely upon the precedent so "essential" to the decision in that case, having specifically rejected it, in an earlier decision. *State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312 (1951); 38 Va. L. Rev. 1075, 1076 (Dec. 1952).

II

The protection accorded Jehovah's Witnesses in New Hampshire fully establishes and guarantees their constitutional liberties. These rights have always been protected by the constitution, statutes and decisions of this jurisdiction in a manner recently approved by the Supreme Court of the United States.

Appellant has no grounds on which to complain about the courtesy and treatment which the state courts have scrupulously accorded to him and his brethren.

The freedoms of the First Amendment which have been recognized for over twenty-five years to be guaranteed against abridgment by the states under the due process clause of the Fourteenth Amendment, have always been accorded the highest degree of protection by the Constitution, laws and decisions of New Hampshire. Because of this, the theory recently advocated as to "deferred" and "preferred" rights has had no perceptible impact on our court decisions in New Hampshire. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, 87 L. ed. 1628, 63 S. Ct. 1178 (1943); *Saia* v. *New York*, 334 U. S. 558, 562, 92 L. ed. 1574 68 S. Ct. 1148 (1948); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115, 87 L. ed. 1292, 63 S. Ct. 146 (1943); *Schneider* v. *Irvington*, 308 U. S. 147, 161, 84 L. ed. 155, 60 S. Ct. 146 (1939). But see, Frankfurter, dissenting, *West Virginia State Board of Education* v. *Barnette*, *supra* at pages 648, 649, and *"Second-class Constitutional Rights: Deferred Rights Versus Preferred Rights"* John Edward Thornton, 36 A.B.A.J. 640 (1950).

In 1942, the New Hampshire Supreme Court was faced with the problem of flag salutes. This was two years following the Gobitis decision, which had sustained the requirement of the flag salute, and two years before the Barnette decision, which overruled the Gobitis holding. The New Hampshire court found with certainty that it could not order the children of Jehovah's Witnesses to salute the flag. Not only was there no authority to make such an order, but the opinion stated that there would be "grave doubt" as to the constitutionality of such a statute. *State* v. *Lefebvre*, 91 N. H. 382, 387, 20 A. 2d 185, (1941). In that case, the children had been suspended from school under a school board regulation for no other reason than that they had refused to salute the flag because of their bona fide religious principles. Proceedings had been instituted to commit them to the State Industrial School as habitually delinquent children because of truancy. "But" said our court (p. 385) "in view of the sacredness in which the State has always held freedom of religious conscience, it is impossible for us to attribute to the legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious religious scruples not shared by the majority of the community . . ."

Another instance in which the court of New Hampshire has protected the Jehovah's Witnesses in anticipation of a vindication of their rights by the Supreme Court of the United States is in the field of child labor laws. In *State* v. *Richardson*, 92 N. H. 178, 27 A. 2d 94 (1942), our court held that the prohibition forbidding an adult to permit children to sell newspapers on the public streets did not apply to children of the Jehovah's Witnesses' persuasion. Nevertheless, two years later, this court in *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 88 L. ed. 645, 64 S. Ct. 438 (1944), sustained a similar prohibition as ap-

plied to this sect. In his dissent, Mr. Justice Murphy noted that the Court of New Hampshire had refused to apply the penalty to Jehovah's Witnesses, citing the *Richardson* case, *supra*.

It is perhaps worth pointing out that the freedoms of conscience, religion, toleration, press, speech and assembly have been protected since the New Hampshire Constitution was adopted eleven years before the adoption of the Constitution of the United States. *Constitution of New Hampshire*, Part I, Bill of Rights, Arts, 4th, 5th, 22nd, 30th, 32nd. Since its adoption, we have recognized the rights of religious minorities. Any person "who is conscientiously scrupulous" about bearing arms shall not be compelled to do so. *Ib.*, Art. 13th. Nor have we required Quakers to take the usual form of oath. *Ib.*, Part II, Art. 84. In 1641 we adopted The Body of Liberties, which "was the first elaborate scheme of statute law made operative by colonial legislation." Vol. I, *Laws of New Hampshire, Province Period*, 748, ftnote. Edited by Albert Stillman Bachellor (1904). Liberty 95, entitled "A Declaration of the Liberties the Lord Jesus hath given to the Churches" reads in part (par. 10):

> "We allow private meetings for edification in religion amongst Christians of all sortes of people. So it be without just offence for number, time, place and other circumstances."

Cf., *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766 (1942); *State* v. *Derrickson*, 97 N. H. 91, 81 A. 2d 312 (1951).

Thus, New Hampshire since its earliest days has recognized and lived by the freedoms which appellant contends are here abridged, and in recent years the Court has been ahead of its time in protecting these ancient rights particularly in the cases of Jehovah's Witnesses.

At the same time that the Body of Liberties was adopted (1641), the colonists recognized that:

> "Civil Authoritie hath power and libertie to deal with any Church member in a way of Civil Justice, notwithstanding any Church relation, office or interest". *Body of Liberties, supra,* 58

In the two instances where we have recognized the "power and libertie" of "Civil Authoritie" the decisions have been sustained by this Court. *State* v. *Cox,* 91 N. H. 137, 16 A. 2d 508, (1940) sustained, *Cox* v. *New Hampshire,* 312 U. S. 569, 85 L. ed. 1049, 61 S. Ct. 762 (1941); *State* v. *Chaplinsky,* 91 N. H. 310, 18 A. 2d 754, (1941) sustained, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766 (1942). The courts today recognize that "even if activities . . . be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they will not cloak a person with immunity from the legal consequence for concomitant acts committed in violation of a valid criminal statute." *Ib.* p. 571. Nor is the right of free speech absolute. *Ib.* and cases *cited.*

In the present case, the court did not refuse to hear evidence (as it had in the Chaplinsky case) but having heard the evidence, it determined that the facts disclosed did not constitute a defense to the charge. This court has already stated that "Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine." *Chaplinsky* v. *New Hampshire, supra,* at p. 574.

III

The administration of justice consistent with well established rules of state procedure does not constitute a bill of attainder nor a violation of due process.

In the present case, the state courts have unanimously agreed that a collateral attack upon the denial of a permit to use the park did not constitute a defense to the charge of using it without permission. While this fundamental of state procedure is of more recent vintage than the liberties which have been discussed, it is equally well recognized and most certainly was not devised for the purposes of this case. The question had not been raised in the earlier proceeding by the agreed statement of facts before the trial. *Cf., State* v. *Derrickson,* 97 N. H. 91, 81 A. 2d 312 [1-7] As demonstrated by the citations of the court, this procedure was consistent with the previous practice established in this state. Under these circumstances the decision of New Hampshire does not contravene either section 10 of Article I of the Constitution of the United States nor the requirements of dues process under the Fourteenth Amendment. *Frank* v. *Mangum,* 237 U. S. 309, 326, 343, 59 L. ed. 969, 35 S. Ct. 582 (1914).

To the effect that decisions of administrative agencies are not open to collateral attack in New Hampshire, see: *State* v. *Stevens,* 78 N. H. 268, 99 Atl. 723 (1916); *Pittsfield* v. *Exeter,* 69 N. H. 336, 338, 41 Atl. 82 (1898).

IV

The extraordinary remedies which were available to the appellant in this case, as construed and applied by the New Hampshire Supreme Court in the exercise of its supervisory authority over lower courts and administrative agencies, afford speedy and ample relief to vindicate constitutional rights under a valid statute.

There can be no doubt as to the availability of "*certiorari* or other appropriate civil proceedings," as stated

by the Court. It is perhaps elementary; but such a statement by the highest court of the state includes such a finding. The lower court, having heard the testimony over the protests of the city solicitor, did not hesitate in making the finding of fact that the action of the city council was arbitrary and unreasonable. The fact that the trial court, which would also have had jurisdiction on a writ of *certiorari* in this same case, made such a finding, demonstrates beyond the shadow of a doubt, that immediate relief would have been granted if the issue had been before him in a proceeding which would have attacked the council's action directly.

The position of the appellant is somewhat anomalous in this aspect of the case. He has conceded throughout these proceedings that the statute is valid. *Cox* v. *New Hampshire, supra.* The Supreme Court of the United States having sustained that statute, sanctioned the registration requirement as construed by the court of last resort in New Hampshire. True, the administrative agency did not have "too wide" a discretion, but the requirement of registration was held constitutional and reasonable. Thus, the position of the appellant appears to be that he had a *right to a license* (rather than that he had a right to speak). The "hair trigger" remedy was, obviously, to assert that right by a direct attack upon the agency which had denied it. As the court suggested *certiorari* was the proper remedy. Nevertheless, with full knowledge of the validity of this requirement, he deliberately chose to violate its provisions. Even if he had believed in good faith that the law was unconstitutional, there would have been a substantial question as to the validity of such a defense. 22 C.J.S. *Criminal Law*, s. 48, p. 114, citing *Hunter* v. *State*, 158 Tenn. 63, 12 S.W. 2d 361, 61 ALR 1148. See *Note*, 61 ALR 1154 *et seq.* Nor as a general rule, would his religious convictions constitute a defense for his committing an act in violation of statute under these circumstances. 22 C.J.S. *Criminal Law*, s. 51,

p. 11); *Manchester* v. *Leiby* 117 Fed. (2d) 661 (1941); *State* v. *White*, 64 N. H. 48, 5 Atl. 828 (1886); *Reynolds* v. *United States*, 98 U.S. 145, 25 L. ed. 244 (1878). To sustain the contentions of the appellant in this case, therefore, would be to grant immunity to a particular religious sect from obedience to the general civil regulation. It is submitted that the time has not yet come when an individual, or a group may so assume the functions of the judiciary. In this case, there is no time burden as suggested by appellant's brief. (p. 30) Nor does the case of *Royall* v. *Virginia*, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510 (1886) give any support for his view. There, in fact, the court said that mandamus would lie in a case such as the present, because the city council acted wilfully and contrary to the statute as it had been construed by the highest courts. But the Royall case, as the court said, was "different." "The action of the officer [was] based on the authority of an act of the General Assembly of the State, which although it may be null and void, because unconstitutional, as against the applicant, gives the color of official character to the conduct of the officer in his refusal [to issue the license permitting the practice of law]." In the present case, the council, without 'too wide' discretion acted contrary to a constitutional statute as previously construed and sustained. Furthermore, the same day the Royall Case was decided, the court decided *Sands* v. *Edmunds*, 116 U. S. 585, 29 L. ed. 739, 6 S. Ct. 516 (1886) in which the state court had refused the *mandamus* when it had been requested. In the present case there is positive assurance that the extraordinary remedies suggested by the Court would be available. The City Council of Portsmouth could not possibly have made the defense in a mandamus action in this case, which the supervisors could have made in *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064, (1885) namely, "that the

law had conferred upon them authority to withhold their assent, without reason and without responsibility."

The case of *Estep* v. *United States*, 327 U. S. 114, 90 L. ed. 567, 66 S. Ct. 423 (1945) upon which the appellant relies for the proposition that the collateral attack upon an arbitrary decision of an administrative agency may constitute a good defense in a criminal prosecution is easily distinguishable. Davis, in commenting on the case points out:

> "Habeas corpus is the principal but not the exclusive method of reviewing decisions of draft boards under the Selective Training and Service Act of 1940. *Certiorari, . . . mandamus, . . .* injunction . . . , *and declaratory judgment, . . . have all been held the wrong remedy when sought before induction.* Even *habeas corpus* is denied before induction. . . . The only remedy other than *habeas corpus* is through defending a criminal prosecution for refusal to submit to induction." *Davis*, on *Administrative Law*, p. 756 (1951).

He points out that the last proposition was not "clearly established" until the *Estep* decision, *supra*.

In the present case, *however*, the extraordinary civil remedies which Davis says are not available under the Selective Training and Service Act, were available to Mr. Poulos. Furthermore, the subsequent history of the Estep decision and the distinctions made by the Court make it clear that its persuasive authority depends largely upon the facts of the particular case. *Sunal* v. *Large*, 332 U. S. 174, 91 L. ed. 1982, 67 S. Ct. 1588 (1946). See, discussion by Frederick Bernays Wiener, *Effective Appellate Advocacy*, pp. 59 *et seq.* (1950).

So far as assembly goes, the Jehovah's Witnesses have recognized the power of an injunction to restrain local

authorities from interfering with the right of assembly on the ground of fear of mob violence. *Sellers* v. *Johnson*, 163 F. 2d 877, 881-882 (8th Cir. 1947). So far as New Hampshire is concerned, we likewise reject any such apprehension of disturbance as a valid ground for refusing a license. *State* v. *Derrickson*, *supra*.

The position of the appellant might be well taken, if there were in fact an unreasonable time burden imposed upon him in seeking the relief of *certiorari* as suggested by the New Hampshire courts. Whatever may be the basis of his assumption that great time and expense would be involved, does not appear in his brief, and it would be fair to ask that such allegations be substantiated before such use is made of them.

In New Hampshire "it is the constitutional mandate that questions of law belong to the judiciary for final determination as a necessary deduction of the required separation of the legislative, executive and judicial powers of government. *N. H. Const.*, Part I, Art. 37." *Cloutier* v. *State Milk Control Board*, 92 N. H. 199, 28 A. 2d. 554 (1942). In that case, the Supreme Court reviewed the decision of an administrative agency by the proceeding of *certiorari original*. The part of the Constitution to which the Court refers, reads as follows:

> "[Art] 37th. In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."

In an earlier article, the Bill of Rights in the state *Constitution* provides:

> "[Art.] 14th. Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

That this is no empty statement of principle, but a substantial fact is clearly demonstrated by the statutes and decisions which implement these constitutional pronouncements. If extraordinary remedies may be invoked by communists, and horse racers, they would most certainly be speedily available to those who wish to practice their religion. See, *Nelson* v. *Morse*, 91 N. H. 177, 16 A. 2d 61 (1940); (communist invoked *certiorari* and *mandamus* in the same proceeding and obtained a decision from Supreme Court the day after the petitions were filed); *Northampton Racing and Breeding Assn.* v. *Conway, et al.* 94 N. H. 156, 48 A. 2d 472 (1946) (race track promoters came directly into the Supreme Court on *certiorari original* to review the refusal of the state racing commission to grant a license). In instances such as the present, where a *certiorari original* might be desired in order to get a final decision during the two month period between the time the appellant applied for a permit and the time he wanted to speak, (May 4-July 2), questions of fact could be heard and determined by one or more of the justices, or by a master or referee as the court might order. *Revised Laws of New Hampshire*, (1942) *chapter* 369, *section* 6. Such a procedure would be particularly appropriate in a case where, as here, the appellant voluntarily waived his right to a jury trial. [15]

That the Supreme Court would have such jurisdiction cannot be questioned.

> "The supreme court shall have general superintendence of all courts of inferior jurisdiction to

prevent and correct errors and abuses, shall have exclusive authority to issue writs of error, and may issue writs of *certiorari*, prohibition, *habeas corpus*, and all other writs and processes to other courts, to corporations and to individuals, and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts." *Revised Laws of New Hampshire, chapter 369, section 2.*

Any argument that the Supreme Court of New Hampshire would lack original jurisdiction upon a writ of certiorari, to correct the error of the city council in this case would be summarily disposed. We long ago rejected the narrow definition of *certiorari*. We may go outside the record. As far back as the turn of the century, parties in a case such as this were "entitled under the established practice" to *certiorari* as "the most convenient procedure for the settlement of their controversy." *Densmore* v. *Mayor and Aldermen*, 76 N. H. 187, 190, 81 Atl. 533, (1911).

The appellant argues that in election matters this procedure would impose a time-consuming burden on the exercise of constitutional liberties. (30)* In October, 1952, the Supreme Court decided *Daniell* v. *Gregg* and *Fuller*, 97 N. H. 452, 91 A. 2d 461, (1952). Petitioner filed his complaint in the Supreme Court on October first, at two in the afternoon. Orders to appear and answer were accepted by the petitionees within three hours. Appearances and answers had been filed by five o'clock on the following day. Hearings commenced on October third at one o'clock. Depositions were taken at three o'clock and continued on October 4th. The Court rested on Sunday. The trial commenced in the highest court of the state on October 6th. Arguments had been completed and decision handed down on October 8th.

* Figures in parentheses refer to pages of Appellant's Brief.

See, also *Nelson* v. *Morse*, *supra*. Of course, an ex parte temporary injunction could have been obtained in the superior court in less time than it takes to describe it.

All of this procedure should be considered in the light of the facts of this particular case, since it is by a "delicate" balancing of the facts that the Court determines whether the sacred liberties are abridged. The facts in this case show there was a lapse of approximately two months between the time that the Portsmouth City Council denied the permit to speak and the time when the appellant wished to speak.

It is submitted that the solution of this problem is purely local; that the mutual tact and tolerance commended by our state Court in *State* v. *Richardson*, *supra*, that the mutual cooperation recently advocated by this Court in the released time decisions, all lead to this conclusion. See *"Church—State and the Zorach Case,"* 27 Notre Dame Lawyer, 529, 540 (1952). So long as the State of New Hampshire continues as it has in the past, to demonstrate its hospitality to the members of Jehovah's Witnesses, it has every right to expect that its established state procedure will, in turn, be respected. It is only through such mutual respect that the constitutional mandate of New Hampshire, vesting the judicial power in our courts, can be observed. Any other conclusion divests them of the authority to determine when a lower tribunal has acted arbitrarily, and would result in that power vesting in any individual or group which chose to violate the law. Had the question been seasonably raised in accordance with this well recognized state procedure, the time and expense of this litigation would have been avoided.

> "Non-compliance with such local law can thus be an adequate state ground for the decision below." *Edelman* v. *California*, No. 85, decided January 12, 1953.

The first amendment does not require government to show a callous indifference to religious groups. *Zorach* v. *Clauson* 343 U. S. 306, 314, 96 L. ed. 954, 72 S. Ct. 679 (1952). By the same token, the first amendment does not license a religious group to show a callous indifference to civil authority.

Conclusion

It is submitted that the Motion to Dismiss or Affirm the opinion of the Court below should be granted.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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January 29, 1953.